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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

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9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 FRANCISCO ALMAGUER,

13 Defendant.

NO. CR-08-2018-RHW-1

**ORDER GRANTING MOTION  
TO CONTINUE, DENYING  
MOTION TO DISMISS**

14 Before the Court are the Government's Motion to Continue Trial (Ct. Rec.  
15 157) and Defendant's Motion to Dismiss (Ct. Rec. 159). These motions were heard  
16 on an expedited basis without oral argument.

17 Counsel for the Government declares that she only recently learned of a  
18 number of Defendant's statements recorded in a related case by the Department of  
19 Agriculture in Oregon. She also received "documentation related to voluminous  
20 recordings of transactions of the Confidential Informant during the course of the  
21 Oregon case." She declares that she was previously unaware of the statements, and  
22 would have turned them over to Defendant during discovery had she known of  
23 their existence. Accordingly, the Government requests a continuance so that  
24 Defendant may have time to review this new material.

25 Defendant responded with a motion to dismiss, arguing that no remedy less  
26 than dismissal is sufficient to sanction the Government and deter future  
27 misconduct. Defendant acknowledges that "the instant prosecutor came clean and  
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**ORDER GRANTING MOTION TO CONTINUE, DENYING MOTION TO  
DISMISS \* 1**

1 was forthright about the wrong that has taken place,” but argues that the Court  
2 must safeguard the integrity of the judicial process by punishing the Government’s  
3 “simple mismanagement” of this case.

4 Fed. R. Crim. Pro. 16(d)(2) authorizes the Court to sanction violations of  
5 discovery rules. Such sanctions are committed to a district court’s discretion, and  
6 should not be “harsher than necessary to accomplish the goals of Rule 16.” *United*  
7 *States v. Gee*, 695 F.2d 1165, 1168-69 (9th Cir. 1983). The Court finds dismissal to  
8 be an unnecessarily harsh sanction here given the fact that counsel for the  
9 Government did not willfully conceal this discovery material, and indeed turned it  
10 over to Defendant promptly upon receiving it. Moreover, the continuance proposed  
11 by the Government should be sufficient to cure any prejudice that has resulted  
12 from late production. *See United States v. Sterling*, 742 F.2d 521, 525 (9th Cir.  
13 1984) (holding that a district court did not abuse its discretion in declining to  
14 impose sanctions against the Government for a “totally inadvertent” Jencks Act  
15 violation, where that violation was “not due to any willful attempt to conceal  
16 statements from the defense,” the Government exerted best efforts to remedy the  
17 violation upon discovering it, and the violation resulted in no significant injury to  
18 the defendants).

19 Accordingly, **IT IS HEREBY ORDERED:**

20 1. The Government’s Motion to Continue Trial (Ct. Rec. 157) is  
21 **GRANTED.**

22 2. Defendant’s Motion to Dismiss (Ct. Rec. 159) is **DENIED.**

23 3. The jury trial set for December 15, 2008, is **stricken**. A jury trial is **set**  
24 **for February 23, 2009, at 9:00 a.m.**, in Yakima, Washington. Counsel shall  
25 appear in chambers at 8:30 a.m.

26 4. The parties are directed to contact the Court if they believe it is necessary  
27 to schedule a pretrial conference.

28 5. Pursuant to 18 U.S.C. § 3161(h)(8)(A), the time between December 15,  
**ORDER GRANTING MOTION TO CONTINUE, DENYING MOTION TO**  
**DISMISS \* 2**

1 2008, the current trial date, until February 23, 2009, the new trial date, is  
2 **DECLARED EXCLUDABLE** for purposes of computing time under the Speedy  
3 Trial Act. The Court finds that the ends of justice served by such a continuance  
4 outweigh the interests of the public and Defendant in a speedy trial.

5 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
6 order and to provide copies to counsel.

7 **DATED** the 5<sup>th</sup> day of December, 2008.

8 *S/ Robert H. Whaley*

9 ROBERT H. WHALEY  
10 Chief United States District Judge  
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